

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF CALIFORNIA  
3 WESTERN DIVISION

4 THE HONORABLE GEORGE H. WU, JUDGE PRESIDING

5  
6 EVANGELINE RED, et al., )  
7 Plaintiffs, )  
8 vs. ) No. CV 10-1028-GW-AGR  
9 KRAFT FOODS, INC., et al., )  
10 Defendants. )  
11 \_\_\_\_\_ )

12  
13  
14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15  
16 Los Angeles, California

17 Thursday, April 12, 2012, 10:08 A.M.

18 Plaintiffs' Renewed Motion for Class Certification and  
19 Plaintiffs' Motion to Strike or Exclude the Declaration of  
20 Professor Ran Kivetz

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1     **LOS ANGELES, CALIFORNIA; THURSDAY, APRIL 12, 2012; 10:08 A.M**

2                                     **-oOo-**

3                     THE COURT: All right. I presume I've called  
4     every other case except for Red; is that right? Red is the  
5     only one left, right?

6                     Okay. Let me call Red vs. Kraft Foods.

7                     MR. PANOS: Good morning, Your Honor. Dean Panos  
8     and Kenneth Lee on behalf of the defendant Kraft Foods.

9                     THE COURT: All right.

10                    MR. FITZGERALD: Good morning, Your Honor.  
11     Jack Fitzgerald and Gregory Weston from The Weston Firm for  
12     the plaintiff.

13                    THE COURT: All right.

14                    MR. MARRON: Ronald Marron on behalf of my firm.

15                    MS. WADE: Gillian Wade and Sara Avila on behalf  
16     of Milstein Adelman.

17                    THE COURT: All right.

18                    MR. FITZGERALD: And, Your Honor, we also have  
19     Courtland Creekmore and Melanie Persinger from the Weston  
20     Firm here with us today. We have the whole crew today.

21                    THE COURT: Oh, wow.

22                    MR. FITZGERALD: Not the whole crew, but we've  
23     got a portion of the crew.

24                    THE COURT: I am honored and thrilled.

25                    Does that mean nobody is answering the phones at

1 your office?

2 MR. FITZGERALD: It's not the whole crew.

3 THE COURT: All right. We're here on a second  
4 motion to -- a renewed motion for class certification. I  
5 have issued a tentative. Let me ask. Does anyone want to  
6 talk about it?

7 MR. FITZGERALD: Yes, Your Honor.

8 THE COURT: All right.

9 MR. FITZGERALD: I think it makes sense for us to  
10 go first.

11 THE COURT: If you want.

12 MR. FITZGERALD: I'll do it from here, Your Honor,  
13 if that's okay.

14 THE COURT: That's fine.

15 MR. FITZGERALD: So let me begin by saying that we  
16 want to thank the court. This is -- well, you know, we're  
17 optimists, you know, and we think this is a really good  
18 tentative order on almost all points.

19 We're pleased that we were able to show the court  
20 that most of the criteria for certification are met and  
21 we're happy to address the remaining issues that the court  
22 has in mind.

23 THE COURT: That was a waste of 30 seconds there.  
24 No offense but, I mean, what's the point of that?

25 *(Laughing.)*

1           MR. FITZGERALD: Well, Your Honor, I just want to,  
2     you know, we -- the point is just that --

3           THE COURT: You just want to be respectful so you  
4     can really launch into what you think is really wrong with  
5     what I said. That's fine. It doesn't bother me.

6           MR. FITZGERALD: We do want to be respectful but I  
7     also want to emphasize that we're really close in this case  
8     and I think the court is agreeing we're really close.

9           And I just want to make sure that, you know, we're  
10    not -- emphasize that we're not ready to give up, so to  
11    speak, based on these sort of few remaining issues; and  
12    we'll talk about why.

13           So the two things that the court is concerned with  
14    here is it looks like is ascertainability and damages, and  
15    they're somewhat related.

16           On ascertainability, I think what we need to start  
17    with is what the purposes of the ascertainability  
18    requirement is which is two-fold.

19           It's, number one, to determine --

20           THE COURT: Well, let me stop you. It seems to  
21    the court that ascertainability, to my mind, the problem  
22    comes in because if this case is going to go forward as to  
23    damages, you know, 23(b)(3), is it?

24           MR. FITZGERALD: Right.

25           THE COURT: And the problem is I can't imagine it

1 going forward in that particular fashion because, again,  
2 that's where the ascertainability, that's where all these  
3 other problems come up.

4 And it just would seem to me that it could not be  
5 managed in a way, you know, would prove beneficial to anyone  
6 including the plaintiffs, plaintiffs' class, defendant, or  
7 the court.

8 So I have major problems with this case going  
9 forward as some sort of damages action; but I can understand  
10 perhaps that the case could go forward as a case for some  
11 sort of injunctive relief assuming that it's not mooted at  
12 this point in time.

13 Although, you know, I don't necessarily buy it  
14 merely because of the fact that the defendants no longer use  
15 the terminology that they've utilized. They have utilized  
16 clearly in the past and there's nothing to bar them from  
17 utilizing it in the future.

18 The mere fact that they ceased voluntarily for one  
19 reason or another doesn't mean necessarily that that's  
20 mooted out in this particular context especially given the  
21 number of times that they have utilized this type of  
22 approach.

23 And, again, I think it is a major -- I understand  
24 the major issue involved is the extent to which advertising  
25 which denotes some sort of health benefits can be deemed to

1 be misleading if, in fact, the product is not healthy in the  
2 way that the advertisement either states or suggests.

3 Not to say that that, in fact, is done -- what  
4 Kraft has done here; but, you know, I understand that that,  
5 I guess, is the pitch that's being made by plaintiffs.

6 MR. FITZGERALD: Yes, Your Honor.

7 Well, we can certainly talk about a (b)(2) class  
8 and injunctive relief; but I don't want to just leave the  
9 damages --

10 THE COURT: And I don't expect you to necessarily  
11 to; but all I'm indicating is that I have major problems  
12 with 23(b)(3) damages class action because, again, I see  
13 major, major problems.

14 MR. FITZGERALD: Yes, Your Honor.

15 Well, I hope we can alleviate some of the court's  
16 concerns today; and, if not necessarily today, you know,  
17 maybe we should have, you know, a ten or fifteen pages of  
18 briefing on the ascertainability and damages issue.

19 But let me just go into my argument for today and  
20 we'll see where we come out.

21 So the purposes of the ascertainability  
22 requirement is two-fold. One is to determine against whom  
23 any judgment in the case would be *res judicata*; and the  
24 second is to alert class members under the due process  
25 clause, members -- people who are members of the class in

1 order to enable them to opt out.

2 I think what the court's concern with here isn't  
3 really strictly those sort of purposes of ascertainability  
4 but more on the practical side; and two courts recently have  
5 distinguished between ascertainability as a legal issue and  
6 *res judicata* and due process.

7 And really what they say is a distinct concept of  
8 proof of membership; and I think what the court really has a  
9 problem with here is the potential difficulties in proof of  
10 membership.

11 The court addressed one of the cases in its  
12 decision, the *Galvan v. Croslin* case and I'll address that  
13 in a minute. But one of the cases we cited a few times in  
14 our brief was Judge Illston's recent decision in January in  
15 the TFT antitrust -- TFT-LCD antitrust case up in the  
16 Northern District.

17 There the defendants had moved for decertification  
18 based on ascertainability after going through more discovery  
19 and it was revealed that there were sort of practical  
20 problems in people identifying whether an LCD panel in the  
21 products they purchased was made by one of the defendants in  
22 that case versus somebody else.

23 So what the court said in that case and, you know,  
24 we've implored that this court take a careful look at that  
25 case. But the difficulties in identifying the LCD panel had



1 to do with the fact that manufacturers of LCD products  
2 frequently buy the panels for their products from multiple  
3 sources and that they don't keep detailed records of who  
4 they're purchasing from so, therefore, there was no  
5 comprehensive list of model numbers that the class could  
6 rely on to determine if there was a panel that was made by a  
7 defendant.

8           Notwithstanding these difficulties, the court said  
9 that there -- the court found that there were numerous  
10 factors that made it willing to exercise its discretion in  
11 favor of certification.

12           One of these was that defendants, during that time  
13 period, had an overwhelming market share of the panels in  
14 all products.

15           THE COURT: Let me just ask. That situation is  
16 not even remotely similar to this one so I don't --

17           MR. FITZGERALD: I think it is.

18           THE COURT: Let's get to the point. I mean --

19           MR. FITZGERALD: I think it is in this way, Your  
20 Honor. Here the issue -- I think there are two issues about  
21 why this might not be ascertainable. One is what we refer  
22 to is outliers, sort of these products that were sold at the  
23 same time but which didn't have the representations.

24           But after doing that analysis, you know, we were  
25 able to calculate that the most those outliers could have

1     accounted for was about 6 percent of the products sold  
2     during the time period. So really, the vast majority, 94  
3     percent or more of the products, sold from 2006 to 2010 bore  
4     the representations.

5             So to the extent that there's an issue of proof  
6     and there would be over-inclusiveness, the analogy to the  
7     market share is that --

8             THE COURT: Well, let me just ask you. In other  
9     words, but the claimants here who are going to be  
10    purchasing, in other words, are they persons who only bought  
11    during that period of time? Or are they also persons who  
12    bought before that time and after that time?

13            Because if they bought only because of that during  
14    that point in time, I can sort of understand what you're  
15    saying. But if, in fact, they bought before, continued to  
16    buy during, and bought after, I don't understand what their  
17    claim would be.

18            MR. FITZGERALD: Well, Your Honor, I think that  
19    comes down to the substantive elements of the UCL, FAL, and  
20    CLRA; and I think the tentative very carefully identified  
21    that.

22            It's not that those people will have to have  
23    individual reliance during the time period. I mean, it's  
24    okay if class members purchase before and after because the  
25    question is whether they were exposed to a representation

1 that's likely to deceive a reasonable consumer. That's an  
2 objective question.

3 And the California Supreme Court has said that the  
4 injury is being exposed to --

5 THE COURT: Let me just ask you. If you have  
6 proof that a person bought before, during, and after, what  
7 is going to be the evidence of that -- that the purported  
8 fraudulent statement had some sort of an effect?

9 MR. FITZGERALD: The evidence is all objective  
10 evidence based on the reasonable consumer standard so we're  
11 going to submit evidence of materiality from Kraft's  
12 documents.

13 In fact, the court found in its tentative order  
14 that we made at least a threshold showing of materiality;  
15 but whether the representations were material is not  
16 evaluated by individual consumers.

17 It doesn't matter whether actually, in fact, it  
18 was material to absent class members. All that matters is  
19 if it reach the --

20 THE COURT: For purposes of damages?

21 MR. FITZGERALD: Yeah, for purposes -- right, for  
22 purposes of damages. Because as *Sterns* said in footnote 13  
23 in the *Sterns* decision --

24 THE COURT: In other words, the defendant can be  
25 punished for engaging in conduct that had no effect on the

1 particular class member and the class member can get damages  
2 for that?

3 MR. FITZGERALD: Right. Because -- because  
4 California has -- what *Sterns* said is California has enacted  
5 what amounts to a presumption that if a defendant puts out  
6 tainted bait and somebody bites, they've been damaged.

7 And then --

8 THE COURT: But if the exact -- but if the product  
9 is exactly the same before, during, and after, it's not  
10 tainted bait.

11 MR. FITZGERALD: In terms of the pricing that --  
12 so I think we are identifying then is really a question of  
13 fact about whether there was --

14 THE COURT: Well, you know, this -- my problem is  
15 that these are the types of problems that if this matter  
16 proceeds as a, you know, damages action, I just can't  
17 imagine how one would resolve this type of scenario given  
18 the variations because we have, again, multiple products but  
19 I do agree that, you know, taking the products into  
20 subclasses helps a lot.

21 But conversely, however, the representations  
22 during these periods of time are not the same; and then we  
23 have obviously evidence of persons buying before, during,  
24 and after.

25 And so we're not limiting it just to only people

1 who only bought during this period of time; and then there's  
2 the question of valuation in terms of any purported injury  
3 or damages. I mean, how would that even be calculated?

4 MR. FITZGERALD: Well, Your Honor, we are limiting  
5 it to people who are buying just during this time because  
6 the classes are defined by dates; and as we noted, there are  
7 no end dates because Kraft has provided them as part of its  
8 briefing.

9 So on any given class, there's a begin date and an  
10 end date. Somebody who's a member of that class may have  
11 also purchased it before the begin date or after the end  
12 date but that's not relevant to whether they can recover for  
13 unlawful conduct that was made during the class period under  
14 a subclass.

15 And then --

16 THE COURT: Let me just ask. Let's assume people  
17 bought before the purported misrepresentations and bought  
18 during the period of the misrepresentations -- alleged  
19 misrepresentations but bought less?

20 Does that mean that they are still damaged?

21 MR. FITZGERALD: Yes, Your Honor. Any person --

22 THE COURT: Well, wouldn't it show that the  
23 misrepresentation had adverse affect and so, therefore, they  
24 could have decided that they didn't want to eat healthy  
25 anymore, they want to eat more junk food, and that by

1 putting this alleged thing of saying it was healthy had an  
2 adverse affect on them.

3 MR. FITZGERALD: I understand the logic of Your  
4 Honor's argument or at least hypothetical argument or  
5 devil's advocacy. But this -- remember, under California  
6 law, these standards are all based on the objective  
7 reasonable consumer. We're not going to be looking at what  
8 individual absent class members did.

9 THE COURT: Is that for purposes of liability or  
10 is that for purposes of damages?

11 MR. FITZGERALD: That's for purposes of both, I  
12 believe, because if you have liability, what *Sterns* and  
13 *Tobacco II* say is -- *Sterns* said if you put out tainted bait  
14 so, in other words, if there's liability, then anybody who  
15 bit on it was damaged.

16 Even if, in fact, they --

17 THE COURT: But damages is, you know, the tainted  
18 bait is kind of pejorative because the tainted bait you're  
19 saying it's tainted bait. But the plaintiffs here aren't  
20 alleging an actual health impact on class members.

21 What they're saying is a financial aspect of it is  
22 the damages is my understanding and so, therefore, we're  
23 talking about something that's totally different it seems to  
24 me.

25 MR. FITZGERALD: Oh, well, Your Honor, the

1 allegation is that there was a statement made on the package  
2 or a message conveyed by the packaging as a whole that  
3 the packaging was --

4 THE COURT: Not the packaging but that the product  
5 itself.

6 MR. FITZGERALD: The product -- a misleading  
7 message that the product itself is healthier than it  
8 actually is.

9 THE COURT: Yes.

10 MR. FITZGERALD: In terms of --

11 THE COURT: But the injury is a financial injury.  
12 The injury is not a health injury which makes it different  
13 from other types of cases.

14 MR. FITZGERALD: That's true. But it wasn't a  
15 health injury in *Sterns* either; and in any event, I think --  
16 and also in *Tobacco II* was -- *Tobacco II* was false  
17 advertising case. It wasn't a smoking case but it was false  
18 advertising.

19 So there was a health element to it and there's a  
20 health element to it here; but it comes down to if anybody  
21 buys a product that has a representation on it that has been  
22 determined to be deceptive, they've been harmed.

23 Whether or not they've sort of actually been  
24 harmed, if you went and talked to them, that's really not  
25 relevant under California law.

1 California law presumes that anybody who's bought  
2 a product with a deception has been harmed because  
3 California law gives consumers the right to be free from  
4 deceptive products and deceptive statements.

5 So there is an injury there. Remember, only the  
6 named plaintiff has to show lost money or property.

7 Now, I also want to --

8 THE COURT: In this type of context of small type  
9 of purchasing, in other words, I could understand, you know,  
10 if somebody buys something that's fairly substantial, you  
11 know. You know, one can presume that, you know, it has some  
12 affect or something of that sort.

13 But we're here, again, I don't know of any cases  
14 but maybe that one case, which is an outlier, where the  
15 product was, you know, something that is, you know, a small  
16 consumable item. And, again, these are the problems that  
17 the court finds in a damages type of action.

18 MR. FITZGERALD: And, Your Honor, let me also draw  
19 the distinction between damages under the CRLA and  
20 restitution.

21 Damages, actual damages have to be calculated and  
22 we've suggested a means for calculation. I think that means  
23 would work. It's been accepted in other cases.

24 THE COURT: Which one are you talking about? You  
25 gave two.



1           MR. FITZGERALD: Well, number one, I think that  
2 full refunds is appropriate. Two cases, two recent cases I  
3 found this, one is steroid hormone and another was the  
4 Kroger case that we cited in our Kivetz' motion.

5           And the reason for that is because the plaintiffs  
6 there allege that they wouldn't have bought the products at  
7 all had they not been misled by the --

8           THE COURT: Obviously, that's not what we have  
9 here.

10          MR. FITZGERALD: -- misrepresentation. I don't  
11 know if that --

12          THE COURT: You're not going to have -- I don't  
13 think you're going to have -- are you going to have somebody  
14 who says they would not have bought the product at all but  
15 for the representation?

16          I mean, if you have that and if that is pretty  
17 much going to be true of every class member, I do agree that  
18 that is very significant and the defendant would have a  
19 harder time making arguments of one sort or another.

20          But it's my understanding that the plaintiffs are  
21 not going to go anywhere close to that. In other words --

22          MR. FITZGERALD: Well, Your Honor, it's an  
23 allegation in the Complaint and there is actually a third  
24 plaintiff Ford-Soon who bought the Teddy Grahams at issue  
25 and I'm not familiar with what his circumstances are

1 particularly but -- and in any event not up for being a  
2 class representative at this point, so I don't know that  
3 it's relevant.

4 But in any event, it's an allegation in the  
5 Complaint and, you know, I think it's an issue of fact. But  
6 even if the court doesn't want to accept full refunds, the  
7 alternative we've proposed is finding basically a price  
8 premium using comparators and courts do this all the time.  
9 We can either compare these products to the same Kraft  
10 products that were sold.

11 THE COURT: But let me just ask. If the price of  
12 the conduct -- and I'm not saying this is true but I assume  
13 hypothetically -- if the price of the product did not change  
14 once the misleading language was put on there, then when you  
15 say a "price premium," what price premium are you talking  
16 about?

17 MR. FITZGERALD: Your Honor, if discovery reveals  
18 that the price did not change, then there may be a damages  
19 issue that we have; but we have not been given discovery on  
20 pricing. We asked for it and we were refused it; and at the  
21 end of the day, it's an issue of fact for determination at a  
22 damages phrase at trial or maybe on summary judgment.

23 So it is possible that there are no damages if  
24 there was no price premium. In terms of actual damages  
25 under the CRLA. But that's not enough to deny

1 certification.

2 But I do want to draw the distinction between  
3 damage under CRLA and restitution. It's clear that  
4 restitution is something different and that the court has  
5 wide discretion to order restitution so long as there's a  
6 factual basis for it, but that's not the same as a  
7 calculation.

8 THE COURT: Is restitution even possible here?

9 MR. FITZGERALD: It is possible, Your Honor.

10 THE COURT: To return that which they consumed?

11 MR. FITZGERALD: Well, wouldn't it be the  
12 plaintiffs returning what they -- restitution doesn't  
13 require an equal exchange. Restitution would be made for --

14 THE COURT: It depends on the nature of the  
15 restitution. For example, sometimes restitution means that  
16 you put the parties back to where they were in square one.

17 In other words, that which supposedly is defective  
18 that plaintiff purchased, the plaintiff returns. In  
19 exchange, the defendant returns the full amount of the money  
20 that they received from the particular exchange in question.

21 MR. FITZGERALD: I think the way that we would  
22 argue this on summary judgment or at trial is that these  
23 products were labeled as being something, as being -- or  
24 there was a message that they were healthy products and, in  
25 fact, they were unhealthy products.

1           So we're going to present evidence about just how  
2     unhealthy they were, about what sort of an increase in risk  
3     of heart disease, increase in risk of Alzheimer's and cancer  
4     these products -- consumption these products presented.

5           And then the fact-finder will be able, using that  
6     sort of evidence, to determine what the products were  
7     actually worth if they were not labeled as healthy but just  
8     were presented what they actually are.

9           So, again, there's ample authority in *Colgan* and  
10    *Fletcher v. Pacific* that the court has wide discretion to  
11    award restitution as long as it has some factual basis.

12          And I'd just like to quote the *Wiener v. Dannon*  
13    case on this. The court there said: If the class succeeds  
14    on the CRLA claims, then actual damages for these claims can  
15    be calculated by subtracting the value of the products  
16    without the claimed health-claim benefits, uniform value to  
17    be determined based on the evidence at trial from the price  
18    the particular class members is able to prove he or she  
19    paid.

20          Furthermore, with respect to the restitution  
21    permitted under CRLA and the UCL, the court has very broad  
22    discretion to determine an appropriate remedy award as long  
23    as it is supported by evidence and is consistent with the  
24    purpose of restoring to the plaintiff the amount the  
25    defendant wrongfully acquired.

1           Not only that, but *Colgan* and *Fletcher* say  
2       restitution can also be used to punish a defendant and to  
3       prevent them --

4           THE COURT:   What was that case again?

5           MR. FITZGERALD:   *Colgan v. Leatherman Tool Group*.

6           THE COURT:   When was it decided?

7           MR. FITZGERALD:   Oh, when was it decided?

8                        (Pause in the proceedings.)

9           MR. FITZGERALD:   2006.

10          THE COURT:   Okay.

11          MR. FITZGERALD:   And *Fletcher* was decided in 1979  
12       but has been cited hundreds of times since and is  
13       consistently still cited.

14          The last point I want to emphasize on damages is  
15       that even if the court has reservations about it at this  
16       point, the Ninth Circuit almost two years ago, just  
17       February 2010 in *Yokoyama v. Midline*, said definitively  
18       that:   Individual issues of damages cannot defeat  
19       certification in this circuit.

20          In the recent decision of *Johns v. Bayer*, which  
21       was certified out of the Southern District within the last  
22       month or so, reemphasized this point, said that there may be  
23       individual issues of damages but in this circuit it's  
24       insufficient as a matter of law to defeat certification.

25          So I think --

1           THE COURT: But was the issue whether or not it  
2 would be certified as a 23(b)(3) versus 23(b)(2) or is it a  
3 situation where the court refused to certify the class,  
4 period?

5           MR. FITZGERALD: Actually, in both cases -- well,  
6 in the Ninth Circuit case, *Yokoyama*, the Hawaii court  
7 refused to certify the case under 23(b) finding that  
8 individual issues of damages calculations predominated over  
9 common issues.

10           And the Ninth Circuit reversed that and said: No,  
11 the common issues here are whether defendant's  
12 representations were misleading. Individual issues -- they  
13 said individual -- damages is invariably an individual  
14 issue.

15           In fact, the Ninth Circuit said this in *Blackie v.*  
16 *Barrack* back in the '70s. But they said: Damages is  
17 invariably an individual issue, but it's not of sufficient  
18 import to predominate over the issue of whether defendant's  
19 representations were misleading; and that's as a matter of  
20 law in this circuit.

21           THE COURT: Well, what can I say? The Ninth  
22 Circuit has said a lot of things and sometimes later on it  
23 gets reversed, sometimes not.

24           But in either case, the Ninth Circuit doesn't do  
25 the trials of these matters and, again, I cannot imagine

1 some sort of damages class action in this regard. It would  
2 be virtually impossible to do.

3 MR. FITZGERALD: Your Honor, I don't think that's  
4 right. I think what we're going to do is we'll have a  
5 damages expert. We're going -- we'll have records from  
6 Kraft of how many units and at what price it sold the  
7 products. We're going to try to develop to show that there  
8 was a premium so, in other words, once they started using --

9 *(Counsel overtalking; not reported.)*

10 THE COURT: -- the issue of what the premium was.

11 MR. FITZGERALD: Because, well, what we'll do is  
12 once they started selling -- I think we gave the example,  
13 Your Honor.

14 THE COURT: It's not a situation where this  
15 product was not sold before. This product was sold.

16 MR. FITZGERALD: Right and --

17 THE COURT: And did they raise the price when they  
18 stuck this new advertisement on?

19 MR. FITZGERALD: Your Honor, we don't know at this  
20 point because we've been --

21 THE COURT: Well, let's assume for purposes of  
22 argument they did not. Let's assume that this is one of  
23 those situations that they didn't raise the price of the  
24 product when they started this new advertisement,  
25 advertising line, or gimmick.

1 MR. FITZGERALD: Right.

2 THE COURT: What are the damages at that point?

3 MR. FITZGERALD: Your Honor, if that turns out to  
4 be the case, it may be that there are no damages and that we  
5 win on liability and not damages. But that is not a reason  
6 to deny certification; and, you know, I'll go even a step  
7 further and I'll tell you about a case where that happened.

8 THE COURT: Well, let me just ask you. If you win  
9 on liability but you have no damages, do you win?

10 MR. FITZGERALD: Well, you know, again, we're --

11 THE COURT: If you're not seeking some form of  
12 injunctive relief.

13 MR. FITZGERALD: Again, we're talking about only  
14 damages under the CRLA so we still have restitution under  
15 the UCL and FAL and CRLA. They're not the same thing, Your  
16 Honor. One is an equitable remedy and one is compensation.

17 THE COURT: Let's assume the same situation in the  
18 restitution situation. Let's assume that the product was  
19 sold for a dollar a package and then after this advertising  
20 campaign started, it sold for a dollar a package. What's  
21 the restitution?

22 MR. FITZGERALD: I think in that case in the  
23 restitution you don't have to -- it's not a comparator  
24 issue. You're not -- it's not a question of whether there's  
25 a premium.



1           THE COURT: Well, what should the restitution  
2 amount be?

3           MR. FITZGERALD: The restitution would be whatever  
4 the court or the jury determines that the actual value of  
5 the product was if it's something less than a dollar.

6           THE COURT: Well, if the product is exactly the  
7 same, the price has not changed, and there is this  
8 advertisement which does not have to be the basis upon which  
9 the class member purchased the product as long as it was a  
10 factor in the purchase, I guess. I guess maybe that's how  
11 California phrases the law now or whatever.

12          MR. FITZGERALD: Actually --

13          THE COURT: Let's assume that's the case. What is  
14 the restitution amount in that context?

15          MR. FITZGERALD: Your Honor, I think it's whatever  
16 the fact-finder decides it is. That's what *Colgan* says.

17          THE COURT: The fact-finder has to be informed as  
18 to what the law is as to --

19          MR. FITZGERALD: Right. But what *Colgan* says --  
20 what the California law says is that there has to be a basis  
21 in fact but that the court's discretion is therefore very  
22 broad to hold up the purposes of the UCL.

23                 So I think it comes down to what does the court  
24 need to award in restitution in order to uphold the purpose  
25 of the UCL, to prevent defendants from making misleading,

1     deceptive advertisements to the public.

2             If the court -- remember, this is if the court  
3     determines that there was deceptive advertisement. So if  
4     the court determines there was deceptive advertisement,  
5     we're going to present evidence that the ingredients in this  
6     products significantly raised the risk of all sorts of  
7     disease and premature death.

8             And therefore advertising them as healthy -- if  
9     you advertise it as healthy and sell it at a dollar, maybe  
10    it's really worth 50 cents because it gives you a 50 percent  
11    increase in risk of heart disease.

12            THE COURT: Why would that ever be if it was sold  
13    prior to that point in time for a dollar?

14            MR. FITZGERALD: I think that's irrelevant to the  
15    issue of restitution. It may be relevant to damages because  
16    you need sort of a comparator but restitution only has to be  
17    based in -- have some sort of factual basis.

18            THE COURT: No, but I do understand that. But  
19    even talking in terms of restitution, if the product was  
20    sold for a dollar beforehand, sold for a dollar afterwards,  
21    what is the restitution amount? Because, obviously, the  
22    health claim didn't affect price of it.

23            MR. FITZGERALD: Well, Your Honor, again, I  
24    think --

25            THE COURT: It didn't affect the purchasers

1 willingness to pay the price for it since the price before  
2 and after is also the same.

3 MR. FITZGERALD: Well, Your Honor, you can't -- I  
4 don't think you can delve into how it affected absent class  
5 members. That's not the issue under California law. The  
6 issue is whether Kraft made a material misrepresentation  
7 that was likely to deceive the public under the  
8 reasonable -- objective reasonable consumer standard.

9 THE COURT: All right.

10 MR. FITZGERALD: What I would say is this same  
11 issue has to be true in every case. It's got to be true in  
12 *Blue Sky* where, you know, the same beverages may have been  
13 sold before and after with the thing on it.

14 It's got to be true in the walnut case where the  
15 walnuts could have been sold at the same price before and  
16 after with the Omega 3 claims on it.

17 This isn't an issue that's unique to this case,  
18 and it's not an issue that's sufficient to defeat  
19 certification. All it is is an issue of fact and maybe an  
20 issue of law for the merits stage of the case, maybe at  
21 summary judgment or trial, but it's not an issue sufficient  
22 to defeat certification.

23 Thank you, Your Honor.

24 THE COURT: All right. Let me have defense  
25 respond to all this.

1 MR. PANOS: Thank you, Your Honor.

2 I have a couple of points. I think Mr. Fitzgerald  
3 made any misstatements of the law and facts but let me just  
4 highlight a couple.

5 Number one, Judge, he keeps saying: Well,  
6 California law says this and California law says that. UCL  
7 and FAL and CRLA, none of those laws changed Rule 23 at all.

8 And Rule 23 is designed to determine all the  
9 issues that Your Honor is addressing, all the questions  
10 you're asking about manageability, feasibility.

11 THE COURT: Well, but he's saying insofar as the  
12 court's arguments are concerned is that maybe the case --  
13 the claims could be certified both -- I presume this is what  
14 he's going to argue eventually -- claiming that the -- it  
15 should be certified under both sections.

16 Why does it have to be limited to one versus the  
17 other and then, you know, maybe later on in the case, then a  
18 determination would have to be made prior to, obviously, its  
19 being tried as to whether or not it's going to go as a 23,  
20 you know, (b) (3) or (b) (2).

21 MR. PANOS: Because the law says you've got to  
22 address all of these issues you're talking about under the  
23 context of Rule 23, not under the context of the UCL, CRLA.

24 THE COURT: No. But it's still -- there's nothing  
25 in Rule 23 that bars certification under both sections if

1 it's close.

2 MR. PANOS: Well, no, of course not. But the  
3 questions you're raising as to the problems raised by what  
4 they're trying to certify is a Rule 23 question. It has  
5 nothing to do with the UCL or the FAL or CRLA --

6 THE COURT: Yeah, but --

7 *(Counsel overtalking; not reported.)*

8 MR. PANOS: And there's case after case that says  
9 that. So, I mean, it's really -- no one is disputing what  
10 California law says. California law is not dramatically  
11 different than any other states.

12 THE COURT: Oh, trust me, it is.

13 MR. PANOS: No, some California decisions are  
14 outside the norm of what Rule 23 is; but certainly not  
15 California statutory law is not different than almost any  
16 other states.

17 THE COURT: Well, wait a second. You're talking  
18 about the 23 aspect, Rule 23 aspects.

19 MR. PANOS: Because everything -- because it has  
20 to be decided under Rule 23. Your Honor is not going to  
21 make a determination under UCL or FAL or CRLA. You're  
22 obviously going to make a determination under Rule 23.

23 THE COURT: No. But, obviously, the claims that  
24 are involved involve the substantive law. I do understand  
25 that, you know, the substantive law itself doesn't

1 necessarily change the factors in Rule 23.

2 But, obviously, the way that you apply Rule 23  
3 depends upon the context in which they're raised; and so,  
4 therefore, you have to look at the underlying substantive  
5 law or sometimes referred to as, quote, merits to make the  
6 determination as to how in that particular context Rule 23  
7 is applied.

8 MR. PANOS: Well, certainly, Your Honor, but  
9 there's nothing extraordinary about California law in this  
10 regard. Let me go on because it's not worth --

11 THE COURT: I agree.

12 MR. PANOS: You know, every time somebody cite --  
13 the plaintiff cite one of these yogurt cases, I say: Yeah.  
14 Please keep citing them to Judge Wu. Please do.

15 THE COURT: Why? Because I like yogurt?

16 MR. PANOS: Because it shows -- because it just  
17 highlights the fundamental difference in the cases and what  
18 those cases were about.

19 And when Your Honor was talking about them in the  
20 terms of calculation of damages, the *Wiener* case, the *Dannon*  
21 case, the pro-biotic cases, in those cases, as the court  
22 found in class certification hearings, the defendant had an  
23 original brand of yogurt that they have been selling for  
24 years and years and years; and then during the class period  
25 they created this premium brand where they charged more

1 money based on a claim that it had these pro-biotic effects,  
2 these digestive health effects.

3 Okay. The only people the court reasonably found  
4 and which plaintiffs supported with evidence, the only  
5 reason anybody would have bought the new and more expensive  
6 product was because of the claim. Because that was the only  
7 difference in the product was this pro-biotic claim.

8 So if that's what they want to rely on, please do,  
9 because there's no -- any way you could argue that there's  
10 any similarity between those cases. They charged a premium  
11 based on the claim.

12 THE COURT: But is the fact that they want to go  
13 that route and they're wrong bar them from attempting to go  
14 that route and later be proven wrong?

15 In other words, they can say: We insist that you  
16 certify this as a 23(b)(3) and I say: Okay. You twisted my  
17 arm. I'll do it just so that I can you shut up and not  
18 listen to anymore of your argument. But in the end I know  
19 that they're going to lose on that argument.

20 MR. PANOS: The answer is yes, Judge, because what  
21 the court was able to find in certifying the class is that  
22 you do have a cohesive group of purchasers where it could be  
23 found, based on the evidence plaintiffs submitted, not the  
24 arguments that plaintiffs submitted -- because that's all we  
25 ever hear here are arguments and pleadings and reporting

1 back, you know, reciting back to allegations -- is that the  
2 only purchasers of those products were the people who were  
3 purchasing for the pro-biotic effect. That is a 23 issue.

4 And so you have a cohesive group. You can say:  
5 Well, why would somebody pay \$1.50 more for the little thing  
6 of this, who has been a regular Dannon yogurt or Yoplait or  
7 whatever the difference -- and there were two cases against  
8 both manufacturers, General Mills and Dannon -- clearly the  
9 claim had something to do with the purchase decision. There  
10 wasn't this history before, during, and after.

11 And, in fact, Your Honor, you raised the problem  
12 of the before, during, and after purchases; and let me  
13 submit to you, Judge, the reason why that's a major problem  
14 is because there is no case that plaintiff cites in support  
15 of class certification nor could they find where that issue  
16 is addressed.

17 In fact, where that issue is addressed is in the  
18 cases where you have longstanding popular brands. These  
19 iconic brands: The *Listerine* case, the *Coca Cola* case, the  
20 *Orville Redenbacher* case, Your Honor.

21 And the courts highlighted those problems saying:  
22 How am I possibly going to certify a class? This wasn't a  
23 merits issue.

24 How am I possibly going to -- all those cases were  
25 decided on the merits -- or excuse me -- were decided at



1 class certification.

2 How can we possibly certify a class of people  
3 where I've got these longstanding brands where advertising  
4 changed, marketing ploys, pitches, differences, emphasis,  
5 whatever it is, to people who have been buying these  
6 products for decades under a variety of different things?

7 How could we ever have a cohesive group of people  
8 who I can honestly as a court say: Yep. That's like the  
9 pro-biotic case. There's a group of people who clearly  
10 bought based on some representation that, you know, may or  
11 may not ultimately be determined to be deceptive.

12 So the only case that's anywhere close to what we  
13 have here, these Nabisco products, are the three cases in  
14 which the court uniformly, every single time, denied class  
15 certification at the class certification stage.

16 Now, Judge, one of the issues we talked about was  
17 ascertainability; and let me just say this because you're  
18 going to give them a chance to now plead -- well, they  
19 already did this -- try again to do a (b)(2) class under the  
20 notion.

21 Let me just say this. Ascertainability is a  
22 Rule 23(a) issue. If you can't satisfy Rule 23, you can't  
23 get a (b)(2) class either. And Your Honor, I think, made  
24 one statement that I think is incorrect in the tentative.

25 THE COURT: Only one?

1 MR. PANOS: Well, no, a few, but one that  
2 certainly affects where we go from here.

3 Your Honor said that a lack of ascertainability  
4 alone would generally not suitable --

5 THE COURT: What page are you reading?

6 MR. PANOS: It's the *Galvan* case. I'm sorry.  
7 It's page -- you cite *Galvan*. Give me one sec.

8 *(Pause in the proceedings.)*

9 MR. PANOS: I'm sorry, Judge. It's page 6. You  
10 say: A lack of ascertainability alone will generally not  
11 scuttle class certification citing *Galvan*.

12 I think that is a misstatement of the law and I'll  
13 tell you why it's a misstatement of the law.

14 We cited numerous district court cases where the  
15 court of appeals and district courts have denied class  
16 certification because of ascertainability.

17 *Fine v. ConAgra*. That's the popcorn. There were  
18 too many different reasons why consumers would have bought  
19 Orville Redenbacher popcorn. That's exactly what the court  
20 said.

21 I don't have an ascertainable class. I don't have  
22 an ascertainable class. They could have bought it because  
23 it had diacetyl, they could have bought it because it didn't  
24 have any diacetyl, they could have bought it because they  
25 always bought Orville Redenbacher popcorn.

1           The *Hodes v. Van's International* case, the waffles  
2 case. How am I going to determine who's in the class?  
3 There's no receipts to determine who's on there. That's  
4 what the court said.

5           *Oshana v. Coca Cola*. Too many reasons why  
6 somebody would buy Diet Coke. How could I, as a court,  
7 determine whether the person bought it based on the type of  
8 artificial sweetener is in the product and being advertised?

9           THE COURT: But that -- see, that's where I -- in  
10 other words, the problem that I would have and I do have --  
11 and I agree with you -- is in the context of the (b) (3)s.

12           Because that is where those types of  
13 determinations really have to come to fore because the whole  
14 purpose is the damages; and why even go through this charade  
15 if we're going in the end concede that there's no possible  
16 way that we're going to be able to do a damages as the end  
17 result of that litigation.

18           It's different, however, that insofar as the  
19 (b) (2) because the (b) (2) you're only attempting to get  
20 injunctive relief and that is to stop the bad conduct and/or  
21 to prevent its occurrence if it's likely to occur or can  
22 occur in the future.

23           And so, you know, that's the reason I said there's  
24 a possibility for a (b) (2) where I would have major problems  
25 with the (b) (3).

1 MR. PANOS: Well, I'll tell you why because I  
2 think actually Mr. Fitzgerald gave you the reason why.

3 THE COURT: He didn't do it intentionally.

4 MR. PANOS: I actually agree with him on this.

5 There's a *res judicata* effect to that. Who you  
6 put in the class, how you define a class, whatever ruling  
7 comes up as a (b) (2) injunctive relief binds that class.

8 Okay? So they couldn't go back and try to alter  
9 whatever decision is made on the injunctive relief?

10 THE COURT: Why would they want to or --

11 MR. PANOS: Why? Why would it --

12 THE COURT: Why wouldn't -- I mean, what is their  
13 injury? In other words, if a determination is made that,  
14 you know -- you know, if it's litigated and it's eventually  
15 determined that the alleged false statements were not, in  
16 fact, false or not actionably false, I mean, you know, it's  
17 been done so --

18 MR. PANOS: I agree but that you've bound somebody  
19 else from hiring The Weston Firm from trying another shot at  
20 it. I mean --

21 THE COURT: But so what? I mean, it's already  
22 been tried. It's already been done and, you know, that --

23 MR. PANOS: Judge, I agree with you. All I'm  
24 saying to you is the reason why ascertainability is relevant  
25 to (b) (2) is for that legal reason. I'm not saying whether

1 it makes sense for somebody to be able to have another crack  
2 at it.

3 THE COURT: No, but it's ascertainable because --  
4 I mean, the fact that they've defined the class in the way  
5 they've defined -- in other words, limiting it to a product,  
6 limiting it to a period of time, limiting it to a specific  
7 representation or alleged false representation, they've done  
8 that already and, you know, so, okay, it's been litigated.

9 MR. PANOS: Judge, I don't disagree with you.  
10 Look, I don't disagree why any class member would care less  
11 about this case. Okay?

12 I mean, the own plaintiffs that had so many  
13 statements in here that tells you they don't care about the  
14 issues that are being raised in this case. Okay?

15 So I agree with you. But all I'm saying to you is  
16 ascertainability is a 23(a) requirement; and if you can't  
17 show ascertainability, you can't get a (b)(2) class.

18 THE COURT: I don't understand. As long as you  
19 can show -- as long as you can show that --

20 MR. PANOS: You have to certify the class.

21 THE COURT: Huh?

22 MR. PANOS: To give them a (b)(2) class, you have  
23 to define the class.

24 THE COURT: They defined it. Purchasers of the  
25 product during this period of time when there is a material

1 misrepresentation on the product.

2 That, to my mind, is sufficient for a (b)(2). Why  
3 wouldn't it be?

4 MR. PANOS: Because the class isn't ascertainable  
5 for all the reasons Your Honor has been talking about.

6 THE COURT: No, there's a difference between  
7 damages and the injury.

8 MR. PANOS: Your Honor, I respectfully suggest --

9 THE COURT: And I would say this. Under  
10 California law, that's all you need.

11 MR. PANOS: Judge, I respectfully suggest you read  
12 the cases that I've been saying to you: *Fine v. ConAgra*,  
13 *Hodes v. Van's International*, *Oshana v. Coca Cola*, the more  
14 recent *Williams v. Oberon* case where the Ninth Circuit cited  
15 approvingly and it upheld the district court's finding about  
16 all the problems with ascertaining a class where you are  
17 relying on class members to self-select based on, you know,  
18 out the ether.

19 THE COURT: They're not self-selecting.

20 MR. PANOS: Of course they're self-selecting,  
21 Judge, because we know as -- we know from the factual record  
22 that they would have to say: Oh, yeah, I recall back in  
23 2006.

24 THE COURT: Why would they have to do that?

25 MR. PANOS: Because they have to be a class

1 member. How else are we going to determine who's in the  
2 class?

3 THE COURT: Maybe class -- I don't think class  
4 actions have changed so much in the last --

5 MR. PANOS: Judge, they have to self-identify to  
6 become a member of the class.

7 THE COURT: No, they don't. You certify the  
8 class. When do you have to -- for terms of injunctive  
9 relief?

10 MR. FITZGERALD: And, Your Honor, this actually  
11 highlights why ascertainability is not a problem for a  
12 (b) (3) class. What Mr. Panos is talking about is proof of  
13 membership, not ascertainability.

14 The class is ascertainable as a (b) (2) class  
15 because we've defined what the class is and anybody would be  
16 bound by it. So that way, if somebody comes in and says: I  
17 want to -- you know, I want to get injunctive relief against  
18 Kraft for using these things and says: I bought one of  
19 these products so I have standing.

20 Then the court can say: But you were a part of  
21 this definition. I could look at these objective factors.  
22 You bought one of these products during this time period  
23 that had this representation on it, you were part of the  
24 class. You're ascertainable when you come into court.

25 MR. PANOS: Your Honor --

1           MR. FITZGERALD: What he's talking about for  
2       (b) (3) damages is proof of class membership; and he's  
3       talking about: We can't trust people. We can't trust  
4       people. We can't rely on what they say.

5           That's not what *Williams* said, by the way, or the  
6       underlying *Williams* case.

7           And, also, Your Honor said that they can't use  
8       that *Williams* case because it's not precedential; and I  
9       would point out, also, that the Ninth Circuit has never,  
10      never issued an opinion on ascertainability because it's  
11      really not a big issue in these cases particularly when all  
12      the other criteria of Rule 23 are met.

13          MR. PANOS: Judge, I didn't interrupt  
14      Mr. Fitzgerald during his argument. I don't know why he did  
15      so for me.

16          THE COURT: I know. You were amazingly patient.  
17      I was quite surprised.

18          MR. PANOS: Well, because I know you're -- I  
19      just -- whatever.

20          MR. FITZGERALD: I thought I was invited but I'll  
21      sit back down and I'll respond after.

22          THE COURT: You weren't asked by anybody other  
23      than yourself.

24          MR. PANOS: Look, Judge --

25          MR. FITZGERALD: I apologize.



1           MR. PANOS: -- I would suggest, Your Honor, that  
2 if you think that ascertainability somehow is not relevant  
3 to what we're talking about here, I suggest, Your Honor --

4           THE COURT: No, I'm not saying that it's not  
5 relevant because, obviously, I've indicated that's a major  
6 problem insofar as (b) (3) is concerned.

7           The question to my mind is the extent to which it  
8 becomes a problem in the (b) (2) context of this case.

9           MR. PANOS: Since Your Honor is giving them an  
10 opportunity to sort of do that, I'll address it at such time  
11 as Your Honor wants to do that; but I'm pretty confident  
12 we're right on that.

13           But, look. I don't want what there is more to  
14 argue about it. I think Your Honor has indicated that  
15 you're going to give them some opportunity to do this and,  
16 again, in some way.

17           THE COURT: Well, but I -- the thing I want to  
18 make sure about is a couple of things. I mean, I've raised  
19 a number of issues in this case. You know --

20           MR. PANOS: Can I address one thing though, Your  
21 Honor, just in that regard?

22           THE COURT: Sure.

23           MR. PANOS: Let me just say this and I don't know  
24 where we're going from here other than it sounds like the  
25 tentative is still tentative.

1           We've been at this a long time and we've spent my  
2       client a lot of money.

3           THE COURT: You asked for a lot of continuances,  
4       too.

5           MR. PANOS: Well, I mean -- there -- let me just  
6       say --

7           THE COURT: In other words, I should be denying  
8       your request for continuances from now on because you guys  
9       certainly asked for a lot of them which I've --

10          MR. PANOS: Well, you know, two hundred pages of  
11       briefing, I guess, sort of gets you that. But, Judge, this  
12       an adversary proceeding where they have a burden of proof  
13       and they have to come forward with the proof at the time  
14       Your Honor notices up the motion or the motion is noticed  
15       up. Okay?

16          And all I'm saying, Judge, is we gave them one  
17       shot at the apple. You come forward with your evidence.  
18       Class denied. We gave them again shot. Come forward with  
19       your evidence. Class denied. And now it almost sounds like  
20       here we go again. Been there.

21          In my mind, Your Honor, and I think in my  
22       experience, you know, it's an adversary proceeding. You  
23       come forward with your evidence. If it's not sufficient to  
24       meet your burden of proof, you lose and you go on.

25          And if Your Honor is wrong, we should take this up

1 to -- they can take this up under Rule 23(f) if they think  
2 that Your Honor erred by denying class certification here;  
3 and all I'm saying is we've kind of got to get to the end of  
4 this.

5 THE COURT: I understand that but, hey, what can I  
6 say? Let me just ask, get some of these questions  
7 answered --

8 MR. PANOS: Sure.

9 THE COURT: -- and we'll figure out where we're  
10 going from there.

11 The court has already indicated and I think  
12 somewhat clearly that I have major problems with the  
13 23(b)(3). Or do the plaintiffs wish to persist along those  
14 lines?

15 MR. FITZGERALD: Yes, Your Honor. I don't think  
16 we're willing to concede the 23(b)(3) class --

17 MR. PANOS: Your Honor --

18 *(Overtalking; unreportable.)*

19 THE COURT: The question is how much more  
20 litigation -- now you're interrupting him. You were better  
21 before.

22 MR. FITZGERALD: Your Honor --

23 THE COURT: Let me just ask. What are you  
24 going -- what else are you going to show me, present to me  
25 that would cause me to change my tentative in this regard?

1           MR. FITZGERALD: Well, I'll give you an example.  
2 One of the things in your tentative you said is that unlike  
3 this case, the *Galvan* case involves a situation where the  
4 defendant had records of the retailers to which have sold  
5 the products.

6           Well, that's not unlike this case --

7           THE COURT: That's not -- but that's -- no, there  
8 are no records insofar as class membership is concerned and,  
9 therefore, if this case is a damages case, in other words,  
10 you're saying that you're going to calculate damages -- I  
11 mean, again, I don't understand. I really cannot conceive  
12 of a way in which damages would be calculable in this  
13 particular situation.

14           MR. FITZGERALD: Your Honor, if that's the case,  
15 then I think the best thing to do would be to maybe to --  
16 you know, we disagree with that. I want to make that clear.

17           But if we have not convinced the court, I think  
18 the thing to do would be maybe to not certify the CRLA  
19 damages claim. But this -- that -- it's not the same  
20 analysis for restitution.

21           But the reason I was talking about the *Galvan* case  
22 is because the issues in that case on ascertainability were  
23 the same. They said consumers discard their calling cards  
24 just like people discard their packaging here.

25           Consumers wouldn't remember the pin on their

1 calling cards so they couldn't know which one. Consumers  
2 wouldn't remember where they bought the calling cards.

3 But what the *Galvan* court said is that the  
4 defendant, *Croslin*, had records of which retailers it had  
5 sold the cards to so that they could post notice at those  
6 retailers and reach the same people who used those  
7 retailers.

8 Kraft has records of the retailers. It knows who  
9 it sells its products to; and one of the questions you asked  
10 in your tentative is: What are the practical ways we can  
11 use to identify members here?

12 I want to emphasize that. Almost everybody who  
13 purchased one of these Kraft products from 2006 to 2010 or  
14 2011, depending on the subclass period, bought one with a  
15 misrepresentation.

16 MR. PANOS: Fundamentally a false statement,  
17 Judge.

18 THE COURT: Again, you were so good before.

19 MR. PANOS: It's --

20 THE COURT: Let me just stop you. You know, you  
21 recognized that you were good before so be good and let him  
22 finish.

23 MR. FITZGERALD: Your Honor, we've done the  
24 analysis. We can show you and I can go through the analysis  
25 if you like. I have a chart on it. But I can show you

1 that, at most, there's 6.38 percent of products were sold  
2 without misrepresentations during this time period. It's  
3 infinitesimal.

4 But not only that, in order not to be a class  
5 member, a person would have to buy that product during that  
6 time period and only during that time period and not before  
7 or after.

8 Because remember. What they did is they used  
9 these basically during holiday seasons. They put holiday  
10 packaging on it. They put it over the sensible solutions  
11 thing. So they said: Well, we put holiday packaging on it  
12 in Wal-Mart for three months so all of a sudden your class  
13 isn't ascertainable.

14 Well, you know, I would say: So what? So, okay,  
15 some people who bought it at Wal-Mart during those three  
16 months may not have been exposed to misrepresentation on  
17 that particular time.

18 But remember. It's Kraft who said that repeat  
19 purchases are a significant determination of sales for their  
20 products. So it's highly likely that these people purchased  
21 the product before Wal-Mart at Christmastime and after  
22 Wal-Mart at Christmastime; and so these people would be part  
23 of the class notwithstanding.

24 I think if it boils down to it, these sort of  
25 outliers where the misrepresentation wasn't on the package

1 is a fractional of a percent of any of the products or the  
2 sales involved here.

3 And if it had been more, Kraft would have noted  
4 that in the Smith declaration when she said: Well, we used  
5 it during the three months. She would have said: You know,  
6 if it was 50 percent of sales, we would have a problem  
7 because how would we determine 50 percent versus the other  
8 percent.

9 But what we've got here is a 94, 95, 98 percent  
10 chance maybe that somebody is a member of this class  
11 notwithstanding that there were these outliers sold during  
12 the period.

13 And the reason I think TFT is so important is  
14 because in that case the court accepted an 80 percent  
15 likelihood that somebody was in the class as sufficiently  
16 ascertainable.

17 And what the court said is this really boils down  
18 to proof of membership; and that's a distinct concept from  
19 ascertainability: Who's bound by it. We know who's bound  
20 by it. The person who's bound by it is somebody who bought  
21 this product with this representation on it and that's  
22 almost everybody who would be in the class.

23 But I think all this will require is people to  
24 remember whether they bought one of these products from 2006  
25 to 2010; and that's something people can remember. I mean,

1 these are repeat purchasers.

2 Kraft's document say they target mothers of young  
3 children. These are mothers who go to the grocery store  
4 and, you know, buy Teddy Grahams once a month or whatever.

5 And at the end of the day, we will have records  
6 that we can compare against potential class -- if there's a  
7 claims. Remember. All this matters for is if there's ever  
8 a claims period after a settlement or a judgment.

9 But, for example, Kraft has records of the  
10 retailers it sold it to. It has records of the number of  
11 units it sold and the price.

12 THE COURT: The only problem is, to tell you the  
13 honest truth, is to get to a point where we allow persons to  
14 more or less self-select themselves to come into this class,  
15 the notice and things of that sort will be more expensive  
16 probably than whatever they're going to get back from these  
17 purchases. I mean, it is, you know, a --

18 MR. FITZGERALD: Well, Your Honor, that's not a  
19 reason to deny certification and --

20 THE COURT: Perhaps it's a reason to deny  
21 certification for (b)(3) in light of all the other problems  
22 that the court has already discussed, you know.

23 MR. FITZGERALD: Your Honor, I mean, these  
24 products are \$4 billion in sales so I don't think class  
25 notice is going to cost more than, you know, a potential --



1 I mean, we're not going to get the 4 billion back  
2 if Your Honor is not willing to give refunds; and, actually,  
3 it's really 12 percent of that because that was the  
4 nationwide sales and we're in California now.

5 But the fact is these sales are very significant  
6 and the issue isn't whether the extent of the class is  
7 damages. It's whether the criteria are met.

8 Yeah, notice may cost Kraft. We've asked Kraft to  
9 pay notice. It may cost Kraft \$100,000 or \$200,000 to make  
10 notice.

11 THE COURT: It cost Kraft considerably more than  
12 that and --

13 MR. FITZGERALD: Well, just to make notice in  
14 California won't cost more than that. That's a fair number  
15 for notice in California. We made that request in a  
16 footnote in our opening brief and Kraft didn't address it or  
17 contest it.

18 THE COURT: For example, in other words: Did you  
19 ever buy any of these products during this period of time?  
20 Or is it going to be something more specific?

21 Did you buy any of these products at this point in  
22 time with any of the following on the packaging?

23 MR. FITZGERALD: Well, Your Honor, in order to  
24 address this, we submitted a trial plan; and the first  
25 exhibit to that trial plan was a proposed or an exemplar

1 class notice.

2 Dr. Kivetz had purported problems with it and  
3 maybe Kraft does. But what happens is you certify a class  
4 and then the issue of notice comes afterwards.

5 And, typically, the court will order the parties  
6 to confer on the notice and propose something to the class  
7 and that's what we'll do.

8 I mean, actually, TFT addresses this, too. There  
9 were thousands and thousands of models of TVs, computers,  
10 and laptops that had the panels in it that were at issue;  
11 and the court said: Of course we can't have a notice that  
12 lists thousands of these things. But, ultimately, it found  
13 that issue of notice wasn't particularly relevant or  
14 compelling.

15 I'd just direct the court's attention to pages  
16 about 41 and 42 of that decision, the TFT decision.

17 In any event, on the damages issue, the Ninth  
18 Circuit has said that it cannot defeat certification; and  
19 from the tentative, it seemed like the court's only --  
20 although the court had some reservation about other issues,  
21 ultimately the court said the only issue that really would  
22 prevent it at this point from certifying a (b)(3) class is  
23 the proof of damages issue.

24 THE COURT: Well, let me put it this way. I've  
25 also indicated that there are certain of the subclasses I

1 would not approve and I've indicated those.

2 I've also asked whether or not for purposes of the  
3 dates whether or not the dates that the plaintiffs are  
4 proposing the defendants are objecting to, and I haven't  
5 heard anything from the defense in that regard.

6 MR. PANOS: Well, Judge, their dates keep  
7 changing. Yes, we are objecting because there are periods  
8 of time here where clearly there's nothing at issue.

9 But I don't know how to address it other than to  
10 say that within the timeframes that they are proposed for  
11 classes, we -- you can't identify membership and the class  
12 can't ascertain it because of the differential in product.

13 And by the way, Mr. Fitzgerald's statement about,  
14 you know, our calculation of 6 percent, I mean, that's made  
15 up out of whole cloth.

16 But in addition to that, it's not just that there  
17 were long periods where there was nothing on the packaging  
18 that was challenged, that for many of these products the  
19 message changed.

20 It might have had this message versus that  
21 message. It might have been on the front versus the back  
22 which creates some of the problems Your Honor noted in here.

23 So it's not just -- it's just there were long  
24 periods of time where they didn't have the message and  
25 Mr. Fitzgerald's statement about repeat purchases, well,

1 guess what that would include?

2 That would include the decades when you didn't  
3 have the statement on there. Okay? So, you know, it plays  
4 both ways.

5 But the point of the matter here, Judge, is that  
6 no matter how you, you know, look at it in that way, you're  
7 going to have the same major problems in looking at the  
8 class because of the variability over the time.

9 And the only cases that have been certified that  
10 they cite are uniform representations -- meaning the same.  
11 "Uniform" means the same -- to an identifiable class of  
12 persons where the court can find that, yes, this is a group  
13 of people that for, you know, clearly would have found this  
14 to have been a significant reason in their purchase decision  
15 which is why the Ninth Circuit case of *Sterns* he keeps  
16 talking about is, you know, well, there's a whole host of a  
17 myriad of reasons why somebody would have bought it.

18 It's why the Ninth Circuit affirmed the district  
19 court case just a month ago saying there's all sorts of  
20 reasons why somebody didn't get the discount that they would  
21 have wanted that's unrelated to the defendant's conduct.

22 They may have forgotten to cancel their  
23 membership. They may have just forgotten to order the game.  
24 There might have been all sorts of reasons that this court  
25 is not inclined to just accept somebody's subjective

1 statement that I wouldn't have done this or I would have  
2 done this based on that.

3 And unfortunately for plaintiffs in this case,  
4 their own plaintiffs said: I would have still bought the  
5 product and I would have paid the same price. I mean, the Q  
6 and A is so clear on that. I don't even know why we keep  
7 doing this.

8 THE DEFENDANT: Not quite so clear as --

9 MR. PANOS: Well, Judge, I don't know how you can  
10 say anything different other than: Here's the question.  
11 Here's the answer.

12 And the fact that you make a bunch of self-serving  
13 statements around the edges -- that doesn't affect the  
14 prosecutor from saying: Hey, the guy admitted to the murder  
15 five times and who cares what he said that he wasn't there  
16 20 other times.

17 And it doesn't matter. But look. If they want to  
18 try another shot at this and Your Honor is going to let  
19 them, I guess we'll just address all these issues again but  
20 I think there's a limit.

21 THE COURT: Well, but I'll give them another shot.  
22 I want it to be more -- you know, I want it to be more  
23 pinpointed because, again, I agree with the defense in one  
24 sense. I'm getting tired of these as well.

25 So this is what I will do. Let me think about

1 this stuff a little bit more and I'll either have you come  
2 back and give you my final final on this tentative or  
3 whatever. But I want to think about some of the things both  
4 sides have said a little bit more.

5 Are you guys free to come back? Well, I'll just  
6 put it as a potential come-back date. When's the next  
7 scheduled -- anything else scheduled in this matter?

8 MR. PANOS: I don't think we have anything on the  
9 calendar, Judge.

10 THE COURT: Okay. In that case, why don't I have  
11 you guys come back maybe in two weeks, maybe put it on the  
12 26<sup>th</sup>. Is that a doable date for both sides?

13 MR. PANOS: Can I just take a look here, Judge?

14 *(Pause in the proceedings.)*

15 MR. PANOS: Sure. That's fine.

16 THE COURT: Okay. On the 26<sup>th</sup>.

17 And what I'd like you to do is call my clerk up on  
18 the 24<sup>th</sup>, you know, and ask if you really need to come  
19 because it might be a situation where I can either do it  
20 either telephonically or I'll issue something in writing or  
21 something else or I may want you actually to appear to argue  
22 something in addition. Okay?

23 So anything else, gentlemen and lady?

24 MR. PANOS: Thank you, Your Honor.

25 THE COURT: Okay. Have a very nice day.

1 MS. WADE: Thank you, Your Honor.

2 (At 11:06 a.m. proceedings were concluded.)

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5  
6 **CERTIFICATE**

7  
8 I, PAT CUNEO, CSR 1600, hereby certify that  
9 pursuant to Section 753, Title 28, United States Code, the  
10 foregoing is a true and correct transcript of the  
11 stenographically reported proceedings held in the  
12 above-entitled matter and that the transcript page format is  
13 in conformance with the regulations of the Judicial  
14 Conference of the United States.

15 Date: April 13, 2012  
16  
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20 /s/ PAT CUNEO

21 PAT CUNEO, OFFICIAL REPORTER  
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